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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 434

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MEXIA TEXTILE MILLS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the order of the Court of Appeals for the Fifth Circuit, entered on June 3, 1949, deferring action on the Board's motion for the summary entry of a decree and remanding this case to the Board with directions to take evidence and report on questions concerning compliance by the employer, Mexia Textile Mills, Inc., with the Board's order.

OPINIONS BELOW

The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 15-37) are unreported. The *per curiam* opinion of the court of appeals (R. 58-59) is also unreported.

JURISDICTION

The order of the court of appeals was entered on June 3, 1949 (R. 59). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 60). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151 *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 17-19.

STATEMENT

Pursuant to an amended charge (R. 6-7) filed by Textile Workers Union of America, CIO, herein called the Union, the Board on June 27, 1947, issued its complaint (R. 8-10) against Mexia Textile Mills, Inc., herein called the Company, alleging that the

Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act. A hearing on the complaint was held before a trial examiner who thereafter, on December 18, 1947, issued his intermediate report (R. 15-30) finding that the Company had refused to bargain with the Union, which had been duly certified by the Board as the exclusive bargaining representative of the Company's employees within an appropriate bargaining unit, in violation of Section 8 (5) and (1) of the Act. To remedy these unfair labor practices, the trial examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union; and post appropriate notices (R. 31-34).

On December 18, 1947, the Board entered an order transferring the case to the Board and on the same day a copy of the order and the intermediate report were duly served upon the Company (R. 34). The Company at no time thereafter filed any exceptions to the intermediate report (R. 35). Section 10(c) of the Act, as amended,[1] and Rules 203.46 and 203.48 of the Rules and Regulations of the National Labor Relations Board, Series 5, ef-

[1] Section 10(c) provides that the "examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

fective August 22, 1947 (12 F. R. 5656, 5662),[2] in effect at the time the intermediate report herein was issued, provide that if no exceptions are filed, the order recommended by the trial examiner shall become the order of the Board.

The Board, accordingly, on July 2, 1948, issued its order (R. 34-37), adopting the findings, conclusions and recommended order set forth in the intermediate report. On April 11, 1949, the Board filed in the court below the certified record in the case and its petition for enforcement of its order (R. 1-5, 37-38). Thereafter, on May 6, 1949, the Board filed a motion for the summary entry of a decree upon the transcript of the record (R. 38-55), alleging that in view of Section 10(c), mentioned above, and of Section 10(e) of the Act, as amended, which provides that no objection which has not been urged before the Board shall be considered before the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, there were no contestable issues before the court.

In response to the Board's motion for the summary entry of a decree, the Company, on May 16, 1949, filed in the court below a motion to adduce

[2] The Rules provide that any party desiring to file exceptions to an intermediate report and recommended order must do so within twenty days from the date of the service of the order transferring the case to the Board and that if no such exceptions are filed, the findings, conclusions and recommendations contained in the intermediate report and recommended order shall be adopted by the Board as its findings, conclusions and order, and that all objections and exceptions thereto shall be deemed waived for all purposes.

additional evidence (R. 55-58). In its motion, the Company alleged that it had complied with the order recommended by the trial examiner and that it did not believe that the Union continued to represent a majority of its employees.

The court below, on June 3, 1949, entered its order deferring action on the Board's motion for the summary entry of a decree and remanding the case to the Board with directions to take evidence and report: (1) whether and to what extent its order has been complied with; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 59).[3]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for

[3] The Board was in the process of preparing an answer to the motion to adduce at the time it received the court's order. However, the court had before it, in *National Labor Relations Board* v. *Pool Manufacturing Company*, decided by the court below on May 13, 1949 (24 L. R. R. M. 2147), involving a like situation, the Board's opposition to the Company's motion for leave to adduce additional evidence. The court below nevertheless entered an order in the *Pool* case identical with the order entered in this case. The Board is simultaneously herewith petitioning this Court for a writ of certiorari in the *Pool* case.

summary entry of a decree upon the transcript of the record.

REASONS FOR GRANTING THE WRIT

This is one of the five cases which, as is set forth in the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, No. 431, pp. 10-23, filed contemporaneously, the Board has selected as the means for bringing to the attention of this Court its difficulties in securing enforcement of its orders in the Fifth Circuit.

1. In remanding this case to the Board for the purpose of taking testimony and reporting on questions concerning compliance by the Company with the Board's order, the court below failed to observe the ruling of this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, recently reiterated in *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225, that "an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." Notwithstanding the discontinuance by an employer of a proscribed practice, the Board is "entitled to bar its resumption" by obtaining a court decree enforcing its order. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230. Cf. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257.

A Board order "speaks as of the time of the hearing and is founded upon the record before the Board." *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421 (C. A. 2). The effect of a court decree enforcing a Board order, therefore, is to approve the validity of the order as of the date it was entered, and problems arising out of occurrences subsequent to that date should "properly * * * be resolved by the Board on direct resort to it, or by the court it contempt proceedings are instituted." *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106. Accordingly, the entry of a court decree enforcing a Board order does not necessarily mean that the employer must take affirmative action which he has already taken or which intervening circumstances have rendered unnecessary.[4] Thus, if, prior to a court decree requiring the employer to offer back pay to a discriminatorily discharged employee, the employer has already given the employee back pay, he need not do so again subsequent to the decree. Similarly, if at the time of the entry of a court decree enforcing a bargaining order, the employer has already bargained in good faith for a period long enough to dissipate the effects of its unfair labor practice and also long enough to permit the bargaining relationship to

[4] Cf. *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421 (C. A. 2); *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224 (C. A. 8).

work successfully and thereafter the Union, for reasons other than the employer's unfair labor practices, has lost its majority status, the court decree would not have the effect of requiring the employer to renew its bargaining with the Union. In the last hypothetical situation, unless unfair labor practices in addition to a refusal to bargain were involved, it is unlikely that the Board would petition a court for enforcement of its bargaining order; but if it did, the Board, subsequent to the enforcement decree, would probably entertain a representation or decertification petition rather than attempt to require the employer to renew bargaining negotiations. Even then, an enforcement decree might be advantageous, for, if the Union reestablished its majority status and the employer again refused to bargain with it, the Board could institute contempt proceedings in court rather than start anew with another unfair labor practice proceeding. In any event, if the Board should attempt to act arbitrarily or unreasonably, the court can give adequate protection to the employer's rights in any contempt proceeding which might be brought.

2. The courts of appeals, except the court below, have uniformly followed this Court's ruling and have refused to litigate questions of compliance as a condition precedent to the entry of an enforcement decree.[5] Even the court below has, upon

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[5] See *e.g.*, the following cases:
First Circuit: *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 297; *National Labor Relations*

at least three occasions in the past ruled that allegations by the employer that he has complied with the Board's order are no defense to the entry of an enforcement decree.[6]

The court below in this case and in *National Labor Relations Board* v. *Pool Manufacturing Company*, decided May 13, 1949, 24 L. R. R. M. 2147, in which the Board is simultaneously herewith petitioning this Court for a writ of certiorari, has apparently departed from its earlier decisions relat-

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Board v. *L. H. Hamel Leather Co.*, 135 F. 2d 71, 72-73; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252.

Second Circuit: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421.

Third Circuit: *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. 2d 393, 394; *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81.

Sixth Circuit: *National Labor Relations Board* v. *Toledo Desk & Fixture Company*, 158 F. 2d 426; *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 619; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 300.

Seventh Circuit: *National Labor Relations Board* v. *Bachelder*, 125 F. 2d 387, 388; *National Labor Relations Board* v. *Gerling Furniture Manufacturing Co., Inc.*, 103 F. 2d 663.

Eighth Circuit: *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239, certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224.

Ninth Circuit: *National Labor Relations Board* v. *Leftie Lee, Inc.*, 140 F. 2d 243, 250 (C. A. 9); *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. 2d 488.

District of Columbia: *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590.

[6] See, *National Labor Relations Board* v. *Fickett-Brown Mfg. Co.*, 140 F. 2d 883, 884 (C. A. 5); *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); and *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497, 498 (C.A. 5).

ing to the materiality of compliance to the enforcement of Board orders. It has stated no reason for such departure. The only distinction which we can see between the instant cases and the earlier cases is the fact that the instant cases involve Board orders requiring the employer to bargain collectively as a remedy for violations of Section 8 (5) of the Act, whereas the Board orders in the three earlier cases required the employers to remedy violations of Section 8 (1), (2) or (3) of the Act. We do not believe, however, that the nature of the unfair labor practice involved alters the principles applicable, nor has the court below so indicated. Moreover, none of the other courts of appeals has made any such distinction. In fact, in five of the cases wherein the other courts of appeals ruled that questions concerning compliance were irrelevant in enforcement proceedings, the Board orders involved included a requirement that the employer bargain collectively.[7] The conflict between the decision below and those of the other circuits is apparent.

3. The Board considers it important in the administration of the Act that the courts not predi-

[7] See *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252 (C. A. 1); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 619 (C. A. 6); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 250 (C. A. 9); and *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590 (C.A. D.C.).

cate enforcement of Board orders upon the basis of obedience or disobedience of such orders. After the Board has administratively determined the desirability of obtaining an enforcement decree—whether such determination is based on its opinion that the order has not been obeyed or, if obeyed for a while, that the unfair labor practices enjoined are being repeated or are likely to be repeated,[8]—the reason for the Board's request for an enforcement decree should not be the subject of litigation. To open the wisdom of this administrative determination to review by the courts might, in the words of Judge Goodrich, make "a merry-go-round of

[8] The Board's practice in this regard, published in the Federal Register (12 Fed. Reg. 5651) as a part of its Statements of Procedure, effective August 22, 1947, is described as follows:

Sec. 202.13 *Compliance with Board decision and order.*—(a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) The regional director submits to the Board a report on compliance when compliance is obtained. This report must meet the approval of the Board before the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

Sec. 202.14 *Judicial review of Board decisions and orders.*—If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. * * *

the Act." *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81 (C. A. 3). If a plea of compliance can now validly hold up enforcement of the order in this case, then it can just as validly hold up enforcement of the order after the Board has conducted a hearing of the kind directed by the court below; the case might again be remanded to determine compliance questions which might arise subsequent to the second hearing, and so on *ad infinitum*. Success in the administration of legislation such as the Act depends in large measure upon the promptness with which its guarantees are enforced and the course of action directed by the court below therefore seriously jeopardizes the effectual administration of the Act.

Congress, foreseeing these possibilities both at the time of the enactment of the original Act in 1935 as well as at the time it amended the Act in 1947, refused to make compliance with a Board order a basis for withholding an enforcement decree. To obviate the materiality of questions of compliance, the Conference Committee, in 1935, deliberately adopted the language of Section 10 (e) of the Act (49 Stat. 449) instead of the language in the original Federal Trade Commission Act (38 Stat. 717, 720), which had been proposed in the Senate bill, because some courts had interpreted the latter Act as making non-compliance a condition precedent to the right of the Federal Trade Commission to obtain enforcement decrees. In making this change, the Conference Committee ex-

plained (H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5):

> Section 10(c) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any circuit court of appeals, etc. House amendment numbered 15 strikes out the quoted phrase and substitutes "The Board shall have power to" petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

The legislative history of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, discloses that Congress again considered and rejected proposals that Section 10(e) be amended to make compliance with Board orders an issue in enforcement proceedings. See H.R. 3020, as reported, 80th Cong., 1st Sess., p. 40; H.R. 3020, as passed by the House, 80th Cong., 1st Sess., p. 40; Report of the House Committee on Education and Labor, H. Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess., p. 43; H. Rep. No. 245, Minority Report, p. 93; Conference Report, to accompany H.R. 3020, H. Rep. No. 510, 80th Cong., 1st Sess., p. 55. These documents are reprinted in Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), pp. 70, 197, 334, 384, 559.[9]

We believe that in remanding this case to the Board with directions to take evidence and report on questions concerning the employer's compliance with the Board's order, the court below has plainly acted contrary to the clear legislative intent shown above, implemented by the decisions of this Court and all of the courts of appeals which have passed on the question.

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[9] Even if Congress had not specifically rejected the theory upon which the court below acted, its reenactment, without change, of the provision of Section 10(e) in question after many years of uniform judicial construction and application amounts to an expression of legislative satisfaction with the construction so adopted. *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500; *Heald* v. *District of Columbia*, 254 U.S. 20, 23.

4. Since, as shown in the Statement, *supra*, pp. 3-5, the Company has never contested the validity of the Board's order either before the Board or before the court below, no issue as to the propriety of the order exists (Section 10 (c) and (e) of the Act, as amended).[10] The court below, accordingly, was under a duty to enforce the Board's order. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 342-343. This Court, in the latter case, aptly described the duty of the court of appeals in the statutory scheme, as follows:

> Congress has placed the power to administer the National Labor Relations Act in the

[10] In filing its motion in the court below for the summary entry of a decree upon the transcript of the record, dispensing with the necessity of printing the record and orally arguing before the court, the Board followed its usual procedure in cases of this type. This procedure has been uniformly approved by the courts, including the court below. See *National Labor Relations Board* v. *Cordele Manufacturing Co.*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *Davis*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *Amory Garment Company*, 24 L. R. R. M. 2274 (C. A. 5); *National Labor Relations Board* v. *Rowland* (C. A. 5, No. 12829); *National Labor Relations Board* v. *Woodruff* (C. A. 5, No. 12850); *National Labor Relations Board* v. *Ullin Box and Lumber Co.* (C. A. 7, No. 9588); *National Labor Relations Board* v. *Griffin-Goodner Grocery Co., Inc.* (C. A. 10, No. 3752); *National Labor Relations Board* v. *Gunn* (C. A. 3, No. 9822); *National Labor Relations Board* v. *Star Metal Mfg. Co.* (C. A. 3, No. 9981); *National Labor Relations Board* v. *Hill Transportation Co.* (C. A. 1, No. 4395); *National Labor Relations Board* v. *Lancaster Foundry Corporation* (C. A. 6, No. 10847).

Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, this petition for a writ of certiorari should be granted, and that the order entered by the court below on June 3, 1949, should be reversed without oral argument and the case remanded to the court below with directions to enter a decree enforcing the Board's order as requested in its petition for enforcement and in its motion for the summary entry of a decree.

ROBERT N. DENHAM,
General Counsel,

PHILIP B. PERLMAN,
Solicitor General.

National Labor Relations Board.

OCTOBER 1949.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. (Supp. II) 141 *et seq.*) are as follows:

SEC. 10.

* * * * *

(c) * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the plead-

ings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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